Effective Date:
01/01/00

CHAPTER 15

LEGAL ISSUES

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STATE OF WISCONSIN
Department of Corrections

Number: 15.01.01-.04

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.01 TYPES OF WRITS

A Writ of Certiorari is a review or inquiry that requires the reexamination of an action previously taken.

A Writ of Habeas Corpus is a command to bring a person before a court.

A Writ of Mandamus is a command for the immediate performance of a particular act specified in the writ.

A Writ of Prohibition commands that a specific action be terminated immediately.

.02 SUMMONS

A Summons is an order commanding a person to appear before a court, especially to answer a charge.

.03 COMPLAINT

A Complaint is an accusation, a charge that an offense has been committed.

.04 SERVICE

A writ will not be accepted unless it is specifically addressed to the person being served. No employee is authorized to accept service of any legal process directed against the Department or any of its Divisions.

Service is not ordinarily valid unless the writ, summons or complaint is personally delivered. Legal Counsel and the Assistant Attorney General must be advised of exactly how the documents were delivered. If the summons or complaint was not personally served on the named person, the Attorney General's office must have the option of raising improper service as a legal defense to the action.

For Writ of Certiorari only, field staff should advise the server that the Department of Corrections or its Secretary should be named as the respondent, and the writ should be mailed to Office of Legal Counsel, P.O. Box 7925, Madison, WI 53707-7925.

.04 SERVICE (continued)

Federal summons and complaints are generally served through the mail. The summons includes an acknowledgment page and an attached envelope with instructions to sign and return to the federal marshal. DCC staff should not sign the acknowledgment. The document should be sent intact to Office of Legal Counsel, P.O. Box 7925, Madison, Wisconsin 53707-7925.

.05 HANDLING OF DOCUMENTS

The Department is frequently required to respond within a very short time following service. Copies must be sent directly to the following locations immediately after service:

Summons and Complaints:

Office of Legal Counsel
Department of Corrections
P.O. Box 7925
Madison, WI 53707-7925 and

Assistant Attorney General
Department of Justice
123 W. Washington Ave.
Madison, WI 53702

Writs

Office of Legal Counsel
Department of Corrections
P.O. Box 7925
Madison, WI 53707-7925

STATE OF WISCONSIN
Department of Corrections

Number: 15.02.01

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.01 POLICY

Nonrepresented and project employees will be granted time with pay or leave as specified in this section. Leave of absence criteria for represented employees are specified in the applicable union contract.

An employee called as an official court or administrative hearing witness on a case related to his/her assigned duties will be considered in work status for the actual time required. An employee may not retain any witness fees. Such fees must be turned over to the supervisor who will send them to the Department of Corrections Business Office with an explanatory memorandum.

An employee called as a witness in a court case unrelated to assigned duties will be granted appropriate leave of absence to be charged against the employee's leave credits or leave without pay. An employee may accept and retain any witness fees offered.

.01 GENERAL STATEMENT

This chapter contains a summary of court decisions which affect the Division of Community Corrections. The summaries address only those issues raised in the decisions that are of concern to the Division. The reader is cautioned that the findings in one decision may be modified or replaced by the findings in a subsequent decision.

.02 ABSCONDING

- **Absconding is a "serious probation violation"**
  State Ex Rel Shock v H&SS Dept, 77 Wis 2d 362 (1977)

  In this case the court said if an offender absconds or does not advise the probation agent of his or her whereabouts this is a "serious probation violation that often goes to the heart of probation supervision". This makes sense because if the agent does not know where the probationer is there can hardly be any supervision.

- **Leaving the state without permission**
  State ex rel. Cutler v Schmidt, 73 Wis.2d 620 (1976)

  Testimony at the revocation hearing established that the parolee violated express conditions or terms of parole when he left the state without notifying his parole agent of his exact whereabouts until several days later. This was sufficient to justify revocation of the offender's parole.

.03 ALLEGATIONS ADDED LATER

- **In General and Notice**
  State ex rel. Flowers v H&SS Dept, 81 Wis.2d 376 (1978)

  The test for introduction of additional charges or violations at revocation hearings is whether the offender has received adequate and proper notice of the additional charges prior to the holding of the revocation hearing.

  Allegations added for the first time at a revocation hearing are not improper since a preliminary hearing was not necessary with regard to every alleged violation of parole, and adequate notice was given prior to the revocation hearing.

.04 ALTERNATIVES TO REVOCATION CONSIDERED

- **Must consider the ABA standards relating to probation**
  State ex rel. Plotkin v Dept, H&SS, 63 Wis.2d 535 (1974)

This is a leading case often cited by defense attorneys at revocation hearings. The Wisconsin Supreme Court adopted the guidelines recommended by the American Bar Association in Standards Relating to Probation. This requires agents to consider and address the following when recommending revocation of probation or parole:

5.1 Grounds for and alternatives to probation revocation.

Violation of a condition is both a necessary and sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition however, unless the department finds on the basis of the original offense and the intervening conduct of the offender that:

(1) Confinement is necessary to protect the public from further criminal activity by the offender; or

(2) The offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(3) It would unduly depreciate the seriousness of the violation if probation were not revoked.

Agents must consider the following alternatives prior to recommending

revocation of probation or parole:

(I) a review of conditions, followed by changes where necessary or desirable;

(II) a formal or informal conference with the probationer to reemphasize the necessity of compliance with the conditions;

(III) a formal or informal warning that further violations could result in revocation.

Please note that the ABA standards do not require that alternatives actually be tried, it requires that they be considered.

.04 ALTERNATIVES TO REVOCATION CONSIDERED (Continued)

- **Application of ABA standards to parole**
  Van Ermen v H&SS Dept, 84 Wis.2d 57 (1978)

  This decision calls for the application of Plotkin Standards in parole revocation recommendations.

  The Department must at least consider whether alternatives are available and feasible. The agent must be able to show that alternatives were considered but rejected rather than simply state reasons for revocation.

- **Plotkin Standards applied**
  State ex rel Prellwitz v Schmidt, 73 Wis 2d 35 (1976)

  Applied the standards in Plotkin and stated that alternatives to revocation, even though rejected, must be considered prior to a recommendation for revocation. The agent must be able to show that alternatives to revocation were considered and explain why they were rejected.

.05 BAIL

- **Release on bail pending revocation – court authority**
  State ex.rel Dept.H&SS v 2nd Judicial Circuit, 84Wis.2d 707 (1978)

  The court has no authority to release a probationer on bail subsequent to the commencement of revocation proceedings.

.06 CONDITIONS OF PROBATION AND PAROLE

For conditions of probation and parole see [15.03.19 PROBATION] – conditions of probation – reasonableness of conditions – conditions can be related to previous offenses or conduct.

.07 CERTIORARI

- **Scope of review**
  Johnson v Cady, 50 Wis.2d 540 (1971)

  One of Wisconsin's first major parole revocation cases clearly states that the offender's right of review of a revocation hearing is by Writ of Certiorari. The burden of proof lies with the offender to show, by a preponderance of the evidence, that the Department acted "arbitrarily and capriciously" in recommending revocation.

  See Sec. 801.50(5) Wis. Stats which provides that the standard of review of order of the department is whether:

  (1) the Department kept within its jurisdiction;
  (2) it acted according to law;
  (3) its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and
  (4) the evidence was such that the Department might reasonably make an order or determination in question.

- **Supplementing the record**
  Snajder v State, 74 Wis. 2d 303(1976)

  This decision applies the standard of review set forth in State Ex Rel Shock v. H&SS above to parole revocation. Supplementing the record with additional evidence at this review violates the concept of fair play and would violate due process. Neither the department nor the offender are allowed a "second kick at the cat" by submitting new evidence on appeal. The court may not rehear the original case.

- **Timeliness of review**
  State ex rel. Schwochert v Marquette Cty.Bd of Adjustment, 132 Wis.2d 196(1986).

  In this case the failure to commence action seeking review by certiorari within the statutory time frame was fatal to the action.

  The petition must now be filed within 45 days of the revocation decision, Sec. 893.735. Previous to this the time frame was within six months.

.08 COUNSEL

- **Right to counsel at revocation hearings**
  State ex.rel Cresci v Schmidt, 62 Wis.2d 400

  The Supreme Court held that there is no constitutional right to counsel at a revocation hearing. However, the Wisconsin Administrative Code creates a right to counsel at probation/parole revocation hearings. The department of corrections is also required under Sec. 304.06 Wis Stats., to refer persons who appear to be indigent to the public defender.

- **Effective counsel – interpreter**
  State v Neave, 117 Wis.2d 359 (1984)

  Fairness requires that criminal defendants have assistance of interpreters where needed in order to avoid questions of effective assistance of counsel, questions of whether inability to understand testimony resulted in loss of effective right to cross-examination, and avoid feeling of having been death with unfairly which may arise when language barrier renders trial incomprehensible. Although this is a criminal matter, revocation hearings should require no less.

.09 EVIDENCE

- **General – rules of evidence**
  Johnson v Cady, 50 Wis.2d 540 (1971)

  The State of Wisconsin's first major parole revocation case stated that the technical rules of evidence do not apply in revocation hearings. See Sec. 911.01(4)(c) for detail on technical rules of evidence.

- **Exclusionary Rule**
  Pennsylvania Bd. of Probation & Parole v Scott, No. 97-581 (1998)

  The exclusionary rule which prohibits admission of evidence that is improperly obtained by law enforcement does not apply at revocation hearings.

  However, agents need to have reasonable grounds to search as detailed in Ch.DOC 328.21(2)(b) Wis. Adm. Code.

  Further, courts have repeatedly warned that parole officers should not allow police to use a probation/parole search as a substitute for obtaining a search warrant.

.09 EVIDENCE (Continued)

- **Agent's records**
  State ex rel. Prellwitz v Schmidt, 73 Wis.2d 35

  It was held that the Bureau of Community Corrections records are "public records and reports" under the provisions of Sec.908.03(8), Wis Stats., and are therefore admissible at revocation hearings.

- **Agent's records – Presentence Investigation Report**
  State ex rel. Hill v Zimmerman, 196 Wis.2d 419.

  An inmate requested of the Department of Corrections field Supervisor, "any and all... records" in his file. The DOC employee refused to provide the file copy of the Presentence Report, due to confidentiality under sec. 972.15(4)., Wis Stats. The court held that it was proper for the field Supervisor to have denied access to the Presentence Investigation Report.

- **Ex parte communications**
  State ex. Rel Gibson v H&SS Dept, 86 Wis.2d 345 (1978)

  In order to maintain the appearance, as well as the actuality of neutrality, ex part communications should be avoided while revocation hearing(s) are pending.

  Ex parte communications in this context is any communication outside the revocation hearing to the ALJ by either party without giving notice to the other.

.10 FIFTH AMENDMENT

- **At revocation hearings**
  State ex rel. Struzik v H&SS Dept, 77 Wis.2d 216 (1977).

  The Fifth Amendment self-incrimination rule is inapplicable at revocation hearings. Parole agent may hold conditionally free parolee accountable so long as parolee is not forced to compromise his constitutional privilege against self-incrimination at subsequent criminal proceedings.

  The same applies to probationers under State v Evans, 77 Wis.2d 225 (1977).

.10 FIFTH AMENDMENT (Continued)

- **Self-incrimination**
  State v Thompson, 142 Wis.2d 821 (1987)

  Statements given to a parole/probation agent which incriminate the offender cannot be used against the offender in a criminal prosecution. Self-incriminating statements cannot be used against the offender in any circumstances, not even to impeach the defendant's testimony at trial should he or she testify and the deny the crime or conduct.

  Agents should tell offenders that they are required by the rules to provide, on demand, either verbally or in writing, an accounting of their activities and whereabouts; and that not to obey the directive of the agent regarding the accounting is a violation of supervision for which the client can be revoked; and, that nothing said by the client can be used, even to impeach the client, in criminal proceedings against the client.

- **Self-incrimination**
  State v Tarrell, 74 Wis.2d 647 (1976)

  A probationer was ordered to report to the local police department for the purpose of having his picture taken. The picture was then shown to the juvenile victim of a sexual assault for purposes of identification. Ordering the offender to do this is legitimate.

.11 GOOD TIME

- **As a condition to probation**
  Prue v State, 63 Wis.2d 109 (1974)

  The offender was not entitled to good time because his confinement in a reforestation camp was a condition of probation and not a sentence. Probation is not a sentence.

  A court can, however, grant good time otherwise cumulative against a sentence to the county jail as a condition of probation. The court's granting of good time as a condition of probation would have to be pursuant to the provisions of S.973.09(1), Wis. Stats.

.11 GOOD TIME (continued)

- **Good time forfeiture**
  Putnam v McCauley, 70 Wis 2d 256 (1975)

  A mandatory release parolee whose parole is revoked is entitled to due process relating to the determination of how much of his good time (time spent on parole after the mandatory release date is reached) will be credited against service of the sentence.

  It must be noted that this case predates the current S.302.11 Wis Stats, which disposes of the concept of "good time". Good time still exists for persons serving sentences for crimes committed before June 1, 1984, or who are revoked and returned to prison to serve all or part of their previously earned good time on a sentence relating to a crime committed before June 1 1984.

- **Good time forfeiture**
  State ex. Rel Hauser v Carbello

  This decision provides a hearing prior to the forfeiture of any good time. The Department must hold a hearing and exercise its discretion as to forfeiture of good time for each mandatory release or discretionary release parolee whose parole is revoked. However, as noted above the concept of good time only exists for persons serving sentences for crimes committed before June 1 1984.

.12 HEARSAY

- **Reliability**
  Egerstaffer v Israel, 726 F.2d 1231 (1984)

  This case held that hearsay evidence is admissible at revocation hearings. Hearsay is an out of court statement made in court. The court in this case approved of the reliance by the hearing examiner on the out of court statement made by a victim of the offender who was not produced to testify in person and subjected to cross-examination.

  It was stressed in this case that the issue becomes how reliable and trustworthy is the evidence. The agent must be prepared to argue that the hearsay is reliable. An offender can be revoked on reliable or trustworthy hearsay.

.13 MENTAL ILLNESS

- **Mental illness as a defense**
  State ex rel. Lyons v H&SS Dept, 105 Wis 2d 146 (1981)

  A defense alleging mental disease or defect is no defense at a revocation hearing. In this case the department was not stopped from relying on the probationer's criminal conduct of possession of a firearm by a felon even though he was found not guilty by reason of mental disease or defect by the courts.

- **Competency**
  State ex rel. Vanderbeke v Endicott, 210 Wis.2d 503 (1997)

  If the Administrative Law Judge (ALJ) has reason to doubt the competence of the offender at a revocation hearing, the ALJ must refer that offender to the sentencing court for a hearing on and determination of competence.

.14 PRELIMINARY HEARINGS

- **Department's Rule**
  State ex re. Hamilton v Lotter, 138 Wis.2d 350 (1987)

  The department's rule relating to preliminary hearings and the criteria for not holding a preliminary hearing is constitutional. The HA2 Wis. Adm. Code provides five circumstances when the department is not required to provide a preliminary hearing.

.15 BURDEN OF PROOF

- **Preponderance of the evidence**
  State ex rel. Flowers v H&SS Dept, 81 Wis.2d 376

  The proper standard of proof to use in parole and probation revocation hearings is the preponderance of evidence standard. This is less than that of "clear and convincing," and much less than that of "beyond a reasonable doubt".

.16 POLYGRAPH

- **Admissibilty**
  State v Ramey, 121 Wis.2d 177 (1984)

  Polygraph examination results are not admissible in criminal proceedings. Results of polygraph are also not admissible at revocation hearings.

.17 POSSESSION

- **Constructive possession of controlled substances**
  Ritacca v Kenosha County Court, 91 Wis.2d 72.

  To be found guilty of possessing controlled substances, physical possession is not necessary, it is enough that the offender has constructive possession. For possession to be constructive or imputed certain criteria must be satisfied:

  (1) The controlled substances must be found in a place immediately accessible to the offender

  (2) The offender must have exclusive or joint dominion and control. He does not need to actually exercise that control, he needs only the ability to exercise control.

  (3) The offender must have knowledge of the presence of the controlled substances.

  The agent must state the underlying facts on which such determinations are made.

- **Constructive possession of a weapon**
  State v Peete, 185 Wis.2d 4.

  Possession can be both actual physical possession and constructive possession. Following the analysis in Ritacca v Kenosha County Court, above, a person may have constructive possession if the weapon is in an area over which the offender has control and the offender had knowledge of the presence of the weapon.

  Possession can be shared if another person has similar control over the weapon.

.18 PRE-SENTENCE INVESTIGATION REPORT (PSI)

- **Attorney at PSI interview not required**
  State v Knapp, 111 Wis 2d 380 (1983)

  The Court held an accused does not have the right to have counsel present during the pre-sentence interview. The purpose of a pre-sentence report is to assist the judge in selecting an appropriate sentence for the individual defendant. Having counsel present at interview might seriously impede the ability of the trial court to obtain and consider all facts that might aid in forming an intelligent sentencing decision.

.19 PROBATION

- **Probation is a privilege not a right**
  Dobs v State, 47 Wis.2d 20 (1970)

  The court has consistently determined that probation is a privilege and not a right.

- **Probation is not a sentence**
  State v Gereaux, 114 Wis 2d 110 (1983)

  A sentence is the judgment of a court by which the court imposes punishment or penalty. The sentence does not include probation. Probation is a different concept to sentencing.

  The court may impose probation consecutive to a sentence but not consecutive terms of probation (terms of probation that follow each other).

- **Probation commencing on release from institution.**
  Grobarchik v State, 102 Wis.2d 461 (1981)
  It is illegal to commence the term of probation upon release from the institution on parole. Probation consecutive (following) release on parole or to another probation is illegal. However, probation consecutive to a prison sentence alone is allowable.

- **Vacation of probation**

  State v Sepulveda, 119 Wis.2d 546 (1984)

  A trial court may amend the imposition of probation and later sentence to incarceration based on a new factor which was not known at the time of the original disposition.

  Here the defendant was placed on probation by the court with a condition imposed by the court that he enroll in counseling program at Mendota Mental Health Institute. The defendant presented himself at MMHI purposely in such a way that he was not accepted by them. The court, on rehearing, determined that the rejection by MMHI constituted a new factor for re-sentencing such that the court vacated the probation term and imprisoned the defendant.

.19 PROBATION (continued)

- **Conditions of probation**
  State v Garner, 54 Wis.2d 100 (1972)

  The Supreme Court has adopted the American Bar Association Standards Relating to Probation, S.3.2, Nature and Determination of Conditions. The court has authority to impose conditions which are "appropriate and reasonable" as authorized in S.973.09, Wis. Stats.

- **Reasonableness of conditions**
  State v Edwards

  As already noted above conditions of probation and parole must be "appropriate and reasonable". But what does this mean? The Supreme Court of Wisconsin held that a condition is reasonable and appropriate if it advances either of the twin goals of supervision, protection of the public or rehabilitation of the offender.

  A condition is "reasonable and appropriate" if it furthers the protection of the public or rehabilitation of the offender.

- **Reasonableness of conditions**
  Krebs v Schwartz, 212 Wis 2d 127 (1997)

  A condition of probation, which prohibited the offender, who had been convicted of first-degree sexual assault of his daughter, from entering into an intimate relationship with any person without first discussing it with and obtaining his agent's approval was both reasonable because

  - **condition is rationally related to the offender's rehabilitation because it forces him to be honest with others by confronting and admitting to his sexually deviant behavior**

  - **condition serves to protect the public.**

  Further it was held that the condition was not overly broad and did not violate his constitutional right to procreate because the offender is free to maintain platonic relationships with individuals and it is only when the relationship turns intimate or to sexual ratification that the accused needs to seek approval from agent.

.19 PROBATION (continued)

- **Reasonableness of conditions**
  State v Nienhardt, 196 Wis.2d 161, (Ct.App.1995).

  The defendant was convicted of making harassing phone calls. On other occasions she was seen in Cedarburg spying on another. The sentencing court ordered the defendant to stay out of Cedarburg. The defendant argued that the condition was not sufficiently related to the under lying conviction. The court disagreed with the defendant and stated that the condition was reasonable and appropriate.

- **Conditions can be related to previous offenses or conduct**
  State v Miller, 175 Wis.2d 204

  In this case a condition of probation which prohibited the defendant from telephoning any woman not a member of his family without permission of his agent was not unreasonable on the grounds that it did not relate to the offense of burglary and theft for which he was convicted.

  While the offender's past criminal conduct of making sexually explicit telephone calls to women was unrelated to offenses for which he was convicted, defendant needed to be rehabilitated from that conduct, and condition was rationally related to defendant's need for rehabilitation.

- **Conditions imposed by department changed by court**
  State ex rel. Taylor v Linse, 161 Wis.2d 719 (1991)

  The lower court modified terms of probation imposed by the department. The Court of Appeals held that the statute, sec.973.09(3)(a) Wis. Stats., was ambiguous enough so that it could be read to empower the court with the authority to make such modification.

- **Probation reimposed following probation revocation**
  State v Balgie, 76 Wis.2d 206 (1977)

  After revocation of probation on witheld sentence, Sec 973.10 Wis Stats., requires that the court impose sentence. The court may not either refuse to impose sentence or put the defendant back on probation.

.19 PROBATION (continued)

- **Probation before reversal of conviction**
  State v Angiolo, 206 Wis.2d 599 (1996)

  Offender was placed on probation for conviction of felony that was latter reversed on appeal. Pending appeal the probation officer supplied information and evidence to police that the probation officer learned during a home visit. It was held by the court that although the probation was imposed for a felony that was later reversed, the probation was valid and information and evidence gathered by the agent during the home visit need not be suppressed in a new criminal proceeding.

- **Probation extension in order to pay restitution**
  Huggett v State of Wisconsin, 83 Wis 2d 790 (1978)

  This case sets forth criteria for the extension of probation in order to pay restitution.

  Failure to make restitution within the original probation period may constitute cause for extending probation and continuing restitution only only if there is a basis for believing that additional restitution would achieve the objectives of probation and that the defendant could make more than negligible payments during the extended period.

  In assessing the defendant's ability to pay, the trial court should first establish a clear account of exactly how much the defendant has paid and what the source of each payment was. Other pertinent considerations in determining ability to pay include: employment history during the probationary period; employment status at the time of extension; prospects for future employment; sources of income; the costs of supporting the probationer's dependents; other competing demands on the probationer's income.

  The court in extending probation for payment of restitution should also consider the defendant's demonstration of a "good faith effort" to make restitution.

  If the probationer lacks the capacity to pay and has demonstrated a good faith effort during probation, failure to make restitution cannot be cause for extending probation.

- **Probation extension in order to pay restitution**
  State v Jackson, 128 Wis.2d 356 (1986)

  Reaffirms the position in Huggett v State, 83 Wis.2d 790 (1978). The trial court is criticized for continued extensions of probation when it is clear that the probationer is unable to pay restitution.

.20 REINSTATEMENT

- **Finding of violation and tolling of time**
  State ex rel Beougher v Lotter, 91 Wis.2d 321 (1979)

  Here the parolee absconded and his time on parole was tolled. He voluntarily agreed to reinstatement with time tolled. He was not entitled to a hearing to determine his absconding was a violation, since the reinstatement order by the department was tantamount to a finding by the department that he has violated his parole.

.21 RELIGION

- **Constitutional rights**
  Von Arx v Schwartz, 185 Wis.2d 645 (1994)

  The State reasonably attempted to accommodate the defendant's religious beliefs. The requirement that the defendant complete sex offender treatment program that violated some of defendant's religious beliefs is not an overly broad infringement on defendant's right of religious freedom, is reasonably related to the defendant's rehabilitation and reasonably related to the legitimate state goal of protection of the public.

- **Treatment programs and secular alternatives**

  [See 15.03.25].

.22 RESTITUTION

- **Payment of, before amount determined**
  Thieme v State, 96 Wis.2d 98 (1980)

  The probationer was ordered as a condition of probation to pay restitution. Restitution was to be determined. However, before the amount of restitution was determined, the probationer began paying restitution payments to the agent. The probationer was revoked. The fact that he paid restitution before the amount of restitution was determined did not nullify the validity of the payment.

  Payments made prior to revocation, even if the total restitution to be paid was not determined prior to revocation, are not returned to the defendant following revocation.

- **Probation extension for paying restitution**

  [See 15.03.19]

.22 RESTITUTION (Continued)

- **Reasonableness of order**
  State v Monosso, 130 Wis.2d 368 (1981)

  The court upheld restitution ordered as a condition of probation for an offender who, although unemployed at the time of the order, had considerable assets, monthly income, and a strong history of doing well in the business world, and would in the future have the opportunity to have the restitution requirement reduced by the court if the court believed that she could not make full payment.

.23 REVOCATION

- **Revocation ABA Standards**
  [See 15.03.04 ALTERNATIVES TO REVOCATION CONSIDERED].

- **Revocation after acquittal – no double jepoardy**
  State ex rel. Flowers v H&SS Dept (1978)

  The department may proceed with revocation even if the offender was acquitted in a criminal action for the same conduct. This action does not constitute double jeopardy.

- **Revocation after conviction – second revocation hearing - no double jeopardy**
  State ex. rel Leroy v H&SS Dept, 110 Wis.2d 291 (1982)

  The hearing examiner held a revocation hearing and found the agent had failed to prove the allegation by a preponderance of the evidence. The parolee was not revoked. Later he was criminally charged for that same conduct. The agent recommended revocation proceedings and alleged the conviction. The same examiner found a violation and revoked. The court held that this was proper and did not constitute double jeopardy.

- **Due Process**
  Morrisey v Brewer, 408 U.S 471, 92 S.Ct 2593 (1972)

  An historic and fundamental parole revocation case, it set forth the minimum due process necessary for revocation of parole:

  a) written notice of the claimed violations of parole;
  b) disclosure to the offender of the evidence to be used against him;
  c) opportunity to be heard in person and to present witnesses and documentary evidence;
  d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
  e) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
  f) a written statement by the fact finders as to evidence relied on and reasons for revoking.

.23 REVOCATION (continued)

The due process standards in this case also applies to probation revocation hearings following Gagnon v Scarpelli, 411 U.S 778, 93 S Ct. 1756 (1973). Gagnon also provided that appropriate substitutes for live testimony such as affidavits, letters, reports or statements could be used.

- **Competency of offender**

  [See 15.03.13 MENTAL ILLNESS - competency]

- **Revocation hearing location**
  State ex re. Harris v Schmidt, 69 Wis 2d 668 (1975)

  A Wisconsin parolee who violates supervision out of state is entitled to a preliminary hearing according to Morrissey v. Brewer before return to Wisconsin. It is not always required that the hearing be held at the place of the alleged violation or that the witnesses be transported to the place of the hearing, but, where appropriate, conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence may be used, consistent with the requirements of due process.

- **Sex offenders and Alford Pleas**
  Warren v Schwarz, No.96-2441 (1998)

  Sex offenders who enter Alford pleas prior to sentencing can be revoked for failure to complete treatment.

- **Supplementing the record**
  Ramaker v State of Wisconsin, 73 Wis 2d 563 (1976)

  Materials submitted in rebuttal of a Hearing Examiner's recommendation must be confined to a discussion of facts which have been made a matter of record up to an including the administrative hearing. The agent or the offender may not supplement the record once the hearing is concluded by the examiner.

  However, in this case where reviewing court could conclude there was sufficient evidence in the record to revoke and not be influenced by the unconstitutionally received evidence, it was a harmless error to review that evidence.

.24 TOLLING TIME

- **Timeliness of hearing**
  State ex rel Avery v Percy, 99 Wis 2d 459 (1980)

  Where both parole violation and initiation of formal revocation procedures occurred prior to the parole expiration date, the Department properly revoked a parolee even though a final revocation hearing was not held until after the parole period had ended because time was tolled.

  Tolling time statute: 304.072 Wis. Stats. Under this statute time is tolled and the department retains jurisdiction over the offender if it
  (1) issues a violation warrant or
  (2) prepares a violation report or
  (3) commences an investigation.

  Note an investigation can be commenced by something as simple as a phone call.

.25 TREATMENT

- **AODA programs and religion**
  Kerr v Farrey, **95 F.3d 472 (1996).**

  This case upholds the "establishment clause" of the 1st Amendment which guarantees that government may not force or coerce anyone to support or participate in religion or its exercise. Hence agents shall not order an offender to attend a specific program with a religious component including alcohol or drug treatment or a 12 step program. An offender may voluntarily participate in a treatment program or support program with a religious component as long as a non-religious program is also offered. The court ruled that to force an offender to attend a treatment program with religious components (such as the 12 step program) violates this establishment clause.

  An agent may write a rule requiring an offender to attend and complete AODA treatment without naming a specific program. An agent may also provide an offender with a list of acceptable programs, as long as both secular and non-secular options are clearly identified. If an offender chooses to participate in a program having a religious component, the agent should document in the Chronological Log that a secular program was offered.